Proposed Amendment to Rule 14 and Rule 23 of the Massachusetts Rules of Criminal Procedure

The discussion below first describes the reasons for each amendment. Then appears the text of the proposed amendments to Rule 14, showing the revisions and deletions, followed by the proposed Reporter's Notes.

Rule 14(b)(2)

The concern for fairness that lead the Supreme Judicial Court in *Commonwealth v. Blaisdell*, 372 Mass. 753 (1977) to adopt the procedure on which this subsection is based is not confined solely to cases where the defendant intends to rely on a defense of lack of criminal responsibility. Subsequent to the original adoption of this subsection in 1979, the Court has held that its notice procedure applies as well to defenses based on an inability to form the requisite intent for an element of the crime, *see Commonwealth v. Diaz*, 431 Mass. 822, 829 (2000), on an inability to premeditate, *see Commonwealth v. Contos*, 435 Mass. 19, 24 n. 7 (2001), and where the defendant places at issue his or her mental ability voluntarily to waive *Miranda* rights, *see Commonwealth v. Ostrander*, 441 Mass. 344, 352 (2004). In addition, the Court has indicated in *dicta* that the same would hold true in the case of a defense based on battered woman syndrome, *see Ostrander*, 441 Mass. at 355 (2004).

There are two different dimensions to the problem that this subsection addresses. One concerns giving notice to the Commonwealth of a complex issue that the prosecutor otherwise would have no reason to expect to litigate. The other deals with redressing the unfairness of allowing a defense expert to testify based on statements obtained from the defendant without giving the prosecution an opportunity to obtain equivalent access for its expert.

The proposed amendment addresses the first concern by expanding the scope of the notice provision beyond the context of *Blaisdell* to include all mental health defenses. A mental health defense is one that places in issue the defendant's mental condition at the time of the alleged crime, based on a claim that some mental disease or defect or psychological impairment, such as battered woman syndrome, affected the defendant's cognitive ability. These are complex issues for which the prosecutor should have time to prepare, whether an expert testifies for the defense or not. As used in this subsection, the term "mental health defense" does not include a claim that the defendant's cognitive ability was affected by intoxication, an issue that arises more frequently and does not present the same level of complexity as do the former examples.

The proposed amendment addresses the second concern by requiring notice whenever the defendant intends to rely on expert testimony concerning the defendant's mental condition at any stage of the process on any issue, whether it relates to culpability, competency, or because it concerns the admission of evidence. Thus, for example, if the defendant intends to introduce expert testimony in support of a claim that a confession

was not voluntary, as in *Ostrander*, the notice would specify that the witness would testify as to the defendant's mental condition at the time of the confession.

Rule 14(b)(4)

One year after the major revision of Rule 14 in 2004, the Supreme Judicial Court added to the discovery obligations of defense counsel and the prosecutor in *Commonwealth v. Adjutant*, 443 Mass. 649 (2005). *Adjutant* held that:

> where the identity of the first aggressor is in dispute and the victim has a history of violence, . . . the trial judge has the discretion to admit evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated, to support the defendant's claim of self-defense.

Adjutant, 443 Mass. at 30.

The Court went on to create reciprocal discovery obligations if the defendant intends to rely on this new rule of evidence:

> A defendant who intends to introduce evidence of the victim's specific acts of violence to support a claim that the victim was the first aggressor must provide notice to the court and the Commonwealth of such intent and of the specific evidence he intends to offer. This notice must come sufficiently prior to trial to permit the Commonwealth to investigate and prepare a rebuttal. The prosecutor, in turn, must provide notice to the court and the defendant of whatever rebuttal evidence he or she intends to offer at trial.

Adjutant, 443 Mass. at 32.

Amending Rule 14 to incorporate the *Adjutant* requirement makes sense because the issue arises often enough, especially in the District Courts, to justify addressing it in the same place as the other discovery obligations on the defendant. This amendment applies only to situations where the defense intends to raise as an issue the identity of the first aggressor. It does not extend to other cases for which specific instances of the victim's prior violent conduct may be relevant, such as that recognized by *Commonwealth v. Fontes*, 396 Mass. 733, 735-36 (1986) (defendant may introduce specific instances of the victim's violent conduct of which he was aware, to support a claim of self defense).

The obligation of initiating the notice provision of this amendment lies with the defense. Giving the defendant twenty-one days from the date of the pretrial hearing to raise the issue should in the ordinary case be sufficient to allow defense counsel the opportunity to learn, either through the discovery process or by independent investigation, of incidents supporting an allegation that the victim was the first aggressor. Thirty days should also be a sufficient amount of time for the Commonwealth to learn of any evidence that it intends to rely on to rebut this claim. For good cause, the judge may alter the time frame for either party.

In describing the obligation of the defendant to identify specific acts of violence by the victim, the amendment recognizes that there may be cases where the precise details as to time and place may not be available. While this may affect the judge's ultimate decision on whether to admit the evidence or not, it does not affect defense counsel's discovery obligation. The information about each incident must contain as much detail as counsel has available, subject to a continuing duty to supplement disclosure with further information as it comes to counsel's attention.

The amendment contemplates that the prosecutor will reveal all rebuttal evidence, which may include evidence about the victim's role in a prior incident upon which the defendant intends to rely, or that the victim has a reputation for non-violence or otherwise acted in a way inconsistent with the claim that he or she was the first aggressor.

Nothing in this rule is intended to limit the judge's discretion in deciding on the admissibility of the evidence that either party proposes to introduce on this issue. However, the rule does contemplate that the failure of a party to meet the rule's discovery obligations may raise a bar to the introduction of the evidence.

Rule 14(d) and Rule 23

When Rule 14 was substantially revised in 2004, it rendered Rule 23 largely irrelevant. Under the discovery scheme prior to the revision, Rules 14 and 23 performed different functions. Rule 14 dealt with pretrial discovery and made the production of witness statements subject to the judge's discretion. Rule 23 dealt with the mandatory discovery of a witness's statements after the witness testified on direct (though it gave a judge discretion to order their production prior to the witness taking the stand). After the revision, Rule 14 made discovery automatic and mandatory for almost all of the categories of information that Rule 23 covered. Because of a slight difference in the way the two rules define a witness statement, there are only two categories that Rule 23 currently covers that Rule 14 does not address.

One category not covered in Rule 14 comes from Rule 23(a)(1): "a writing made by . . . another and signed or otherwise adopted or approved by such witness." Rule 14 as it currently exists requires the production only of a written statement authored by the witness, not one written by someone else but signed or approved by the witness.[1]

The other category is in Rule 23(a)(4): "those portions of a written report which consist of the verbatim declarations of a witness in matters relating to the case on trial." Rule 14 currently requires only the production of *substantially* verbatim declarations

[1] The full text of Rule 23(a)(1) requires the production of "a writing made by a witness or another and signed or otherwise adopted or approved by such witness." Rule 14 does require the production of a writing *made by a witness*, "other than drafts or notes that have been incorporated into a subsequent draft or final report." Rule 14 as it exists currently does not require the production of a writing *made by another* and signed or otherwise adopted or approved by a witness.

(whether in a written report or not) that are recorded *contemporaneously*. The major difference between these two is the issue of when the writing memorializing the witness's statement was made. The obligation that Rule 23 creates does not depend on the writing being created at the same time that the witness spoke. There is also a minor difference in the way the two rules describe the correspondence between the witness' words and the written statement. Rule 14 is somewhat broader in requiring the production of substantially verbatim declarations, which would include not only those that are precisely verbatim but those with only minor differences from the witness's precise words.

Since Rule 23 now addresses such a limited class of discovery, it makes sense to eliminate it and broaden the definition of a "statement" in Rule 14 to bring the narrow categories of information that it independently addresses into the realm of the automatic and mandatory discovery regime that governs everything else. This amendment does not subject any statement to discovery that was not previously covered by Rule 23. It simply changes the timing, from the now outmoded requirement in Rule 23 that discovery wait until the witness has testified to the pretrial phase of the case under the rubric of Rule 14.

The amendment incorporates the two vestigial remnants of Rule 23 into Rule 14(d) in two ways. It adds language to section 14(d)(1) to include writings "signed or otherwise adopted" by a witness.[2] And, it eliminates the language in section 14(d)(2) that requires a substantially verbatim written account of a witness' oral statement to be contemporaneous.

[2] The proposal does not include the addition of the word "approved" that currently appears in Rule 23 on the ground that it is redundant. Any writing "otherwise adopted" by a witness will perforce be "approved" by the witness.

PROPOSED AMENDMENTS TO RULE 14 SHOWING REVISIONS AND DELETIONS

KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface
~~Strikethrough~~ = removed
Bold = addition to rule

14(b)(2) Mental Health Defense and Impairment of Mental Condition

(A) Notice. If a defendant intends to rely **at trial** upon **a mental health defense raising as an issue the impairment of his or her mental condition** ~~the defense of lack of criminal responsibility because of mental disease or defect~~ at the time of the alleged crime, **or if the defendant intends to introduce expert testimony on the defendant's mental condition at any time,** the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of **the defendant's mental condition at the time of the alleged crime or at another specified time** ~~lack of criminal responsibility because of mental disease or defect~~;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition ~~at the time of the alleged crime or criminal responsibility for the alleged crime~~.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition ~~at the time of, or criminal responsibility for, the alleged crime~~ will be relied upon by expert witnesses of the defendant, the court, upon its own motion or upon motion of the prosecutor, may order the defendant to submit to a psychiatric examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical and psychological examinations and physiological and psychiatric tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the **relevant** time ~~the alleged offense was committed~~. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer **into evidence expert testimony** ~~at trial psychiatric evidence~~ based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical or physiological observations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written psychiatric report which shall contain his or her findings, including specific statements of the basis thereof, as to the mental condition of the defendant at the **relevant** time ~~the alleged offense was committed~~.

The report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the **relevant** time ~~of, or criminal responsibility for, the alleged crime~~, or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during **the presentation of evidence** ~~trial~~ the defendant raises **as an issue the impairment of his or her mental condition** ~~the defense of lack of criminal responsibility~~ and the judge is satisfied that (1) the defendant intends to testify or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the defendant as to his or her mental condition at the **relevant** time. ~~of, or criminal responsibility for, the alleged crime.~~

If a psychiatric report contains both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

14(b)(4) Self Defense and First Aggressor

(A) Notice by Defendant. If a defendant intends to raise a claim of self defense and introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses and dates of birth of the witnesses the defendant intends to call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

(B) Reciprocal Disclosure by the Commonwealth. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the Commonwealth shall serve upon the defendant a written notice of any rebuttal evidence the Commonwealth intends to introduce, including a brief description of such evidence together with the names of the witnesses the Commonwealth intends to call, the addresses and dates of birth of other than law enforcement witnesses and the business address of law enforcement witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under subdivision (b)(4)(A) or (B), that party shall promptly notify the adverse party or its attorney of such evidence.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.

14 (d) Definition. The term "statement,"~~:~~ as used in this rule, means:

(1) a writing made, **signed, or otherwise adopted** by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration ~~and which is recorded contemporaneously with the making of the oral declaration~~, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

PROPOSED REPORTER'S NOTES TO RULE 14

Rule 14(b)(2)

This amendment responds to the Supreme Judicial Court's expansion of the *Blaisdell* procedure to analogous situations such as defenses based on an inability to form the requisite intent for an element of the crime, *see Commonwealth v. Diaz*, 431 Mass. 822, 829 (2000), on an inability to premeditate, *see Commonwealth v. Contos*, 435 Mass. 19, 24 n. 7 (2001), and where the defendant places at issue his or her mental ability voluntarily to waive *Miranda* rights, *see Commonwealth v. Ostrander*, 441 Mass. 344, 352 (2004). In addition, the Court has indicated in *dicta* that the same would hold true in the case of a defense based on battered woman syndrome, *see Ostrander*, 441 Mass. at 355 (2004).

There are two different dimensions to the problem that this subsection addresses. One concerns giving notice to the Commonwealth of a complex issue that the prosecutor otherwise would have no reason to expect to litigate. The other deals with redressing the unfairness of allowing a defense expert to testify based on statements obtained from the defendant without giving the prosecution an opportunity to obtain equivalent access for its expert.

The proposed amendment addresses the first concern by expanding the scope of the notice provision beyond the context of *Blaisdell* to include all mental health defenses. A mental health defense is one that places in issue the defendant's mental condition at the time of the alleged crime, based on a claim that some mental disease or defect or psychological impairment, such as battered woman syndrome, affected the defendant's cognitive ability. These are complex issues for which the prosecutor should have time to prepare, whether an expert testifies for the defense or not. As used in this subsection, the term "mental health defense" does not include a claim that the defendant's cognitive ability was affected by intoxication, an issue that arises more frequently and does not present the same level of complexity as do the former examples.

The proposed amendment addresses the second concern by requiring notice whenever the defendant intends to rely on expert testimony concerning the defendant's mental condition at any stage of the process on any issue, whether it relates to culpability, competency or because it concerns the admission of evidence. Thus, for example, if the defendant intends to introduce expert testimony in support of a claim that a confession was not voluntary, as in *Ostrander*, the notice would specify that the witness would testify as to the defendant's mental condition at the time of the confession. If it appears that the expert will rely on statements of the defendant as to his or her mental condition, then the judge may order the defendant to submit to a psychiatric examination pursuant to subsection 14(b)(2)(B).

Rule 14(b)(4)

This amendment implements the discovery obligation created by *Commonwealth v. Adjutant*, 443 Mass. 649 (2005). The procedure it mandates applies only to situations such as those in *Adjutant*, where the defendant intends to rely on self defense claiming that the victim was the first aggressor. The notice procedure established in this amendment does not apply to other instances where prior violent conduct by the victim may be admissible, such as where the defendant intends to introduce evidence of a violent act by the victim of which he was aware at the time of the incident that is the subject of the criminal case before the court. *See Commonwealth v. Fontes*, 396 Mass. 733, 735-36 (1986). However, in a case where the defendant wishes to introduce evidence of an act of prior violence by the victim to support a claim based on both *Adjutant* and *Fontes,* the notice provision of this subsection would apply.

Beyond notice of an intent to raise the issue of prior violent acts by the alleged victim as it bears on the identity of the first aggressor, the amendment also requires the defendant to provide specific information about each incident. Where the defendant lacks specific details as to the time and place of a prior incident, the notice should contain as much information as is available, subject to a continuing duty to supplement the notice as counsel becomes aware of further facts.

The reciprocal obligation on the Commonwealth extends to all evidence that it intends to introduce to rebut the defendant's claim that the victim was the first aggressor. This may concern the victim's role in the incidents of prior violence upon which the defendant may rely, or any other evidence the Commonwealth may introduce in rebuttal.

This provision does not affect the ultimate decision the judge must make on the admissibility of the evidence contained in the defendant's notice, or of any rebuttal evidence the prosecution might offer. The rule does contemplate, however, that failure to provide notice in advance may bar a party from offering evidence that might otherwise be admissible.

Rule 14(d)

In 2010, Rule 23 was eliminated because the 2004 revision of Rule 14 largely made it irrelevant. Almost all of the statements that Rule 23 required a party to produce after a witness testified were made part of the automatic pretrial discovery mechanism of Rule 14. Because a small class of statements covered by Rule 23 was not included in the definition of a statement in the 2004 revision of Rule 14(d), a 2010 amendment to this subsection was made. The purpose of the amendment was not to expand the class of statements subject to discovery. It merely brought within the confines of Rule 14 the remaining class of statements that were subject to the discovery provision of the former Rule 23.

Section 14(d)(1) was amended to include not only writings made by a witness, but also writings made by another and signed or otherwise adopted by the witness. A person

otherwise adopts a statement when he or she approves it or accepts it as accurate. *See, e.g.*, *Smith v. United States*, 31 F.3d 1294, 1301 (4th Cir. 1994) ("[n]otes taken by prosecutors and other government agents during a pretrial interview of a witness may qualify as a 'statement' . . . if the witness has reviewed them in their entirety--either by reading them himself or by having them read back to him--and formally and unambiguously approved them--either orally or in writing--as an accurate record of what he said during the interview.")

Section 14(d)(2) was amended to remove the requirement that a witness's statement have been recorded contemporaneously. This is an issue that will only be relevant with respect to written accounts of what the witness said, since by their nature stenographic, mechanical, electrical or other means of recordings must be made contemporaneously. With respect to written accounts, Rule 14(d) includes substantially verbatim statements of a witness that are contained in a document written by someone else, whether the document consists solely of the witness's statement or has the witness's statements appear only in part of the document. In the latter case, only that portion of the document that consists of the substantially verbatim account of the witness's statement must be produced. This provision is intended only to require the production of statements that can "fairly be deemed to reflect fully and without distortion" what the witness said. *See Palermo v. United States*, 360 U.S. 343, 352-53 (1959); *United States v Hodges*, 556 F.2d 366, (5th Cir. 1977) *cert. den*. 434 US 1016 (1978) ("The fact that investigators' notes contained occasional verbatim recitation of phrases used by the person interviewed did not make such notes [discoverable].")